PAUL S. COUPEY

IBLA 74-31 Decided February 22, 1974

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting oil and gas lease offer NM 17960.

Reversed.

Oil and Gas Leases: Lands Subject to--Private Exchanges: Generally--Regulations: Interpretation

> Land which was once segregated from mineral leasing by an application for private exchange is again available for mineral leasing after the exchange has been consummated, a patent has been granted with a reservation of the mineral estate to the United States, and that transfer has been properly noted on the land office records.

APPEARANCES: Paul S. Coupey, pro se.

OPINION BY MR. STUEBING

Paul S. Coupey has appealed from the June 7, 1973, decision of the New Mexico State Office, Bureau of Land Management, which rejected his oil and gas lease offer NM 17960.

The lands that he applied for were formerly within the boundaries of Carlsbad Caverns National Park. However, the Act of December 30, 1963, 16 U.S.C. §§ 407e-h (1970) changed the boundaries of the Park and expressly excluded these lands. The statute also authorized the Secretary of the Interior to exchange these excluded lands for other lands. An application for the exchange of these lands was subsequently filed by a private party. 1/ The exchange

1/ Thurman A. Mayes, private exchange application NM 0553634, filed April 15, 1964.

was later consummated and a patent was issued with a reservation of the mineral estate to the United States. 2/ This transfer had been properly noted on the land office records for some eight years before the appellant submitted his application for an oil and gas lease. However, the New Mexico State Office rejected his application on the basis that the land was still segregated from any form of entry by the original exchange application since no notice of the availability of the land for leasing has ever been posted.

The State Office decision is premised upon 43 CFR 2091.2-3, which provides:

> The filing of a valid formal application for exchange under the regulations of Group 2200 of this chapter will segregate the selected public lands to the extent that they will not be subject to appropriation under the public land laws, including the mining laws. Any subsequently tendered application, allowance of which is discretionary, will not be accepted, will not be considered as filed, and will be returned to the applicant. The segregative effect of the application on the lands covered by the recall or rejection of an exchange application will terminate at 10 a.m. on the 30th day from and after the date a notice of the recall or rejection of the application is first posted in the land office having jurisdiction over the lands. (Emphasis added.)

The appellant argues that this regulation applies only to the recall or rejection of the application for exchange and not to situations where, as here, the patent has been granted and the transfer noted on the land office records.

The question, then, is whether the State Office properly construed the scope of the regulation as describing not only the procedure to be followed when an application for private exchange is recalled or rejected, but also where the exchange is consummated, a patent is issued, and the records are duly noted to reflect the action taken.

We find that the decision below is in error in interpreting the regulation to apply in circumstances other than those which it describes. The rules of construction militate strongly against such an implied expansion of the types of situations covered by the regulation. Since it specifically provides under what circumstances it shall be operative, i.e., in event of "recall or rejection" of an exchange application, the implication is that other circumstances are not covered. The rule is that if a statute (or regulation) provides one thing, a negative of all

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2/ Patent No. 30-66-0007, issued July 16, 1965.

others is implied. Expressio unius exclusio alterius est. Sutherland, Statutory Construction, § 57.10 (4th ed. C. Sands 1973).

The purpose of giving segregative effect to an application for private exchange is to keep the land free from the burden of other applications which would require negative adjudication. Tom B. Boston, 6 IBLA 269, 270 (1972); Circular No. 2047, 25 F.R. 5577 (1960). Clearly, that purpose has been fulfilled where the exchange has been consummated and the records so noted. 3/

Absent any contrary provision of statute or regulation, the general practice of the Department with respect to making segregated lands again available has been that notice of their availability should be equivalent to the notice of their segregation. Thus, lands segregated by the record notation of an allowed homestead or desert land entry are made again available to the operation of the public land laws by the record notation that the entry has been terminated. This historic implementation of this policy is described in Earl Crecelouis Hall, 58 I.D. 557, 560 (1943), as follows:

> * * * The Department has also held that the orderly administration of the land laws forbids any departure from the salutary rule that lands which have once been segregated from the public domain, whether by entry, patent, reservation, selection or otherwise, shall not be subject to any form of appropriation until the local land officers * * * shall have entered upon the records of the local office proper notation of the restoration of the lands to the public domain.

In holding that the subject lands are available for oil and gas leasing at discretion, we do not reach the question of whether they are likewise subject to entry under the general mining law. However, we would note by way of dictum that, generally speaking, minerals reserved to the United States in patented lands are not open to mineral entry unless and until such appropriation is provided for by law or regulation. See e.g., Stock Raising Homestead Act, 43 U.S.C. 291, et seq. (1970); Small Tract Act, 43 U.S.C. 682a (1970); 43 CFR 2731.6-3; City of Phoenix v. Reeves, 14 IBLA 315, 327, 81 I.D.(1974). The Department, too, has been loathe to find that lands patented with a mineral reservation are subject to unrestricted mineral entry. Ernest Alpers, A-30627 (March 10, 1967).

3/ The oil and gas plat, the official record showing the status of public domain land and mineral titles and acquired lands, showed that the subject lands were available for leasing at the time appellant's offer was filed. Subsequently, a notation was entered on the plat to indicate that the lands are not open to oil and gas leasing. The effect of this subsequent notation will be accorded no significance as to appellant's offer, as it concerns the precise issue to be decided by this appeal.

The distinction between a certain tract of land being available to mineral leasing and being available to mineral location lies in the fact that leasing is subject to the discretion and control of the Secretary, whereas appropriations under the mining law are not. For this reason the Department has held that a general withdrawal does not necessarily close land to mineral leasing. Noel Teuscher, 62 I.D. 210 (1955).

Finally, we note that the person first making application for an oil and gas lease shall be entitled to a lease as a matter of statutory right if the land is available for oil and gas leasing. 30 U.S.C. 226(c) (1970). Here the appellant has been denied a lease on the basis of the finding below that the regulation applied in a situation which apparently was not contemplated at the time the regulation was drafted and promulgated. We have consistently held that departmental regulations should be so clear that there is no basis for an oil and gas lease applicant's noncompliance with them before they are interpreted so as to deprive him of a statutory preference right to a lease. Murphy Oil Corp., 13 IBLA 160 (1973); Andrew W. Miscovich, 6 IBLA 100, 79 I.D. 410 (1972); Mary I. Arata, 4 IBLA 201, 203, 78 I.D. 397, 398 (1971); Georgette B. Lee, 3 IBLA 272 (1971); A. M. Shaffer, 73 I.D. 293 (1966). In this case, the appellant is the first qualified applicant to apply for these lands and should not be denied that preference right.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

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Edward W. Stuebing, Member

We concur:

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Martin Ritvo, Member

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Douglas E. Henriques, Member